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DEVELOPMENT SERVICES
COUNTER

Mr. Kernen Lien, Senior Planner
City of Edmonds, Planning Division
122 – 5th Avenue
Edmonds, Washington 98020

Hand Delivered

Re: PLN20130022, 50 Pine Street, Edmonds, Reply to APL20130008

Dear Mr. Lien:

This letter is submitted on behalf of Edmonds Pine Street LLC, the property owner and applicant herein (“Applicant”), in response to the appeal of the Architectural Design Board’s (“ADB”) May 16, 2013 design review approval under PLN20130022 submitted by Clair and Bill Widing and Jon and Laura Fleming (“Appeal”).

All citations to the Record are to the complete written record compiled by staff for this matter and available on the City Council’s webpage, by stamped page number. References to the May 15, 2013 ADB transcript are shown as “Transcript at ___”. Citations to the Findings of Fact, Conclusions of Law and Decision adopted by the ADB on August 7, 3013 (“FC”) are shown as “FC at ___”.

A summary of the proposal and its procedural history follows. Parts of I-III of this letter are incorporated into Applicant’s replies to the appeals of the Town of Woodway under APL 20130007 (“Woodway Appeal”), Thomas R. Waggener, et.al under APL20130006 (“Waggener Appeal”), and David Inadomi under APL20130005. More detailed information is available in at Record 0004-05; 0240-243; 0481-490; and Transcript at 6-13.

I. PROPOSAL

Applicant applied for design review of a proposed multi-family building at 50 Pine

Street, the final building to be constructed in the Point Edwards Master Plan area after development of infrastructure and project improvements, nine multifamily structures, and two amenity buildings serving Point Edwards' residents. The design configuration then and now is a single multi-family residential building with a central, recessed and glassed hinge separating two angled wings extending generally from west to east.

Record 0005, 0028, 0035-60. The design went through pre-application review, and was further refined in response to ADB directives given after an initial public hearing last December. Record at 0483-90. The current design approved by the ADB in May is the product of this process.

II. SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. Pre-Application Submittal

Applicant's architect submitted an initial design to the City for pre-application review in May 2012. Record 0004-5, 0483-86. The submittal included substantial design and architectural detail, including color three-dimensional renderings. Record 0483. Two formal design review meetings were conducted with staff from all affected City Departments. Comment was minimal and the proposal changed only modestly. Its site placement, setbacks, height, footprint, overall bulk, façade sizes, roof levels, parking plan, and overall dimensions, have remained largely unchanged from the beginning.

After the second pre-app meeting in September 2012, the proposal was ready for submittal. At that time it encompassed 89 units, allowed under the Point Edwards density limit of 350 units approved by the City in 2005. Record 0226-27.

Staff generally was supportive of the design and identified just two "significant changes" requiring ADB review under its conditions of approval of the Point Edwards development concept in 2002-03. Record 0004, 0485. The two changes related to (1) the landscape plan (specifically a proposed outdoor gathering area and water feature, and increased surface parking), and (2) consistency in the use of colors and materials. Id. No other design issues were identified. Record 0240-41, 0484-85. Applicant submitted its proposed design to the City on November 1, 2012.

B. First Public Hearing

The Planning Division's first staff report was issued on December 6, 2012, just six days before the hearing. The report introduced new issues and design objections not disclosed by staff during the pre-application process and recommended that the ADB required changes. Record 0005, 0241-42; Transcript at 1-3. Applicant went forward with the design that had been favorably reviewed in the pre-app process.

At the December 19, 2012 hearing, Senior Planner Kernen Lien referenced Comprehensive Plan Design Objective C.8.c. calling for a design to retain a connection with the scale and character of Edmonds through using similar "materials, proportions, forms, masses or Building elements." Record 0226. He referred to the elevation drawings for the proposed design, compared them to the most recently approved building design in 2006, and talked generally about horizontal and vertical modulation, decks, roof modulation, and similar design aesthetics. Id. He said nothing about the level of the roof, a stepped structure, or possible removal of a floor of the building. His only specific comment was commentary about the roof design and staff's need for guidance from the ADB as to whether it would be considered to be "modulated" for height allowance purposes. Id.

At the conclusion of the hearing, the Board discussed the proposal on the record, questioned Applicant's architects, and issued four design mandates:

1. The design of building 10 should be more consistent with the other development approved and constructed at Point Edwards under the Point Edwards Master Plan.
2. Additional landscaping should be provided along the rockery or in the parking lot along the south side of the surface parking lot.
3. The Applicant should take into consideration the following design elements present in the existing Point Edwards buildings: residential fenestration, broad overhangs, more human scale, distinction between floor-to-floor heights, and Pacific Northwest elements and materials.
4. The Applicant must submit samples of the proposed materials.

Record at 0005, 0238. The public hearing was continued for this purpose, to be reconvened upon completion of the Board's requested design modifications.

C. Re-design

Applicant went to work to revise the design accordingly. In mid-January 2013, staff advised Applicant that the City's mistaken retention of used environmental mitigation payments made by the Point Edwards Developer meant that a new SEPA review process would be required after all, and that a new traffic study was needed because the City failed to require an updated traffic study when density was increased in 2005. Record 0006, 0242. Applicant had no awareness of these internal issues.

D. Re-submittal

The City's new requirements created practical, procedural, financial, and timing problems. Under Code and Statutory provisions, the safest course was to re-submit the modified design together with the SEPA and traffic materials. Reluctantly, this is the course Applicant followed. Record at 0240-243. The original application was withdrawn on March 25, 2013. The replacement application was submitted, together with a new SEPA checklist and traffic study on March 26, 2013. Id; Record at 0023-25.

E. SEPA Review

The City issued a Determination of Non-Significance ("DNS") on April 12, 2013 which was not appealed. Record at 0006, 0334-35. Staff confirmed the acceptability of the traffic study in its SEPA process, with fees to be determined during building permit review. Record 0271; Transcript at 2, 5.

F. Second ADB Public Hearing

A second public hearing was scheduled for May 15, 2013. On May 9, 2013, the Planning Division issued its second staff report. Staff again found the proposal compliant with all zoning bulk and use standards, including parking requirements. Record 0007-10; 0017. The Report found the re-design a major improvement and generally compliant with the Board's directives and applicable design guidelines (Record 0011-12, Parts D-K) but raised questions about the overall scale of the build and how it fits with the rest of Point Edwards and the surrounding community (Record at 0012-14 Part L). The Report included an entirely new suggestion that the Board require further design revision to remove an entire floor from the building's east wing so it would "step" down from west to east.

Nothing like this had been mentioned by staff or anyone else in the 12 preceding months of pre-application and post-application review, comment, and design revision. Over that time, the size, footprint, skeleton, roofline, overall bulk, and dimensions of the structure remained virtually the same. This was another marked, but far more burdensome, deviation by staff. Staff's other recommended conditions of approval were consistent with prior comments and actions and reasonable. These the Applicant accepted, but strenuously objected to the surprise condition.

At the hearing, Mr. Lien changed course again, admitting his idea to "lop out one of the floors" was "simplistic" and that staff's concerns could be satisfied if other design techniques could produce the impression of a stepped building with five visible stories in the east wing. Transcript at 4. He restated his modified stance under questioning by Chair Gootee. Id. at 6. The Board came back to the issue and discussed it extensively among themselves in deliberations before rejecting any condition along those lines and approving the proposal as otherwise conditioned by a 5-1 vote. Id. and at 27-28.

G. Council Remand.

Three appeals of the ADB's decision were filed and closed record review was scheduled before the City Council on July 2, 2013. At the outset of these proceedings, Special Counsel Carol Morris recommended that the Council remand the matter to the ADB for entry of formal findings of fact and conclusions of law consistent with its decision. The parties had submitted briefing on the question of findings and conclusions.

Remand required Applicant's consent and waiver of time limits for a final decision. ECDC 20.07.005(H). Applicant consented, asking that the matter be handled as expeditiously as reasonably possible, for the benefit of all concerned.

Considerable discussion followed, during which City Attorney Jeff Taraday and Mr. Lien outlined a proposed mechanism for the remand, whereby staff would prepare a first draft of findings and conclusions, make it available to all parties of record for comment and revisions, and prepare a synthesized draft with that input for the ADB's review. Council adopted this proposal and approved the remand 6-1 vote, Council

President Petso opposing. Council thus directed the ADB to consider and adopt findings and conclusions consistent with its May 16, 2013 decision.

H. ADB Adoption of Findings and Conclusions on Remand.

The initial draft prepared by staff contain some blanks and uncompleted sections. Applicant and one other party of record submitted edits, which staff incorporated. Staff supplied draft findings and conclusions to the ADB, showing all changes made by parties of record prior to the August 7, 2013 public meeting.

The ADB reviewed, discussed, and deliberated on the draft findings and conclusions in open session. No public comment or response was allowed. The Board directed questions and comments to City Attorney Taraday, and to Mr. Lien. A number of clarifying, substantive, and corrective changes were made to the draft before it was finalized and approved in the form of the FC.

I. Closed Record Review

At its July 2, 2013 meeting, the Council took steps to be sure that no one was prejudiced by the remand, including allowing the three appellants to again appeal the ADB's decision without any additional filing or appeal fees. These three appellants, including the Town of Woodway, again filed appeals. They were joined by a fourth appeal from two residential property owners in Woodway, for a total of four appeals. These appeals are before the Council under ECDC Ch. 20.07 for review and decision on the record before the ADB.

III. DESIGN REVIEW STANDARDS.

This is a Type III-B decision (ECDC 20.01.030.A) under ECDC Chs. 20.10 and 20.11 requiring design review by the ADB in an open-record public hearing.

ECDC 20.11.020 mandates that the ADB find a proposal consistent with the design criteria specified in Ch. 20.11 "in accordance with the techniques and objectives contained in the design chapter for the community culture and urban design element of the comprehensive plan," [Emphasis supplied], and states expressly that the guidelines in the urban design chapter ("UDGs") "shall determine if an application meets the general criteria set forth in this chapter." The UDGs are the controlling standards. ECDC

20.11.020(A). The UDGs also are the “specific direction and guidance to applicants” required by law and under the Code to be supplied by the City. ECDC 11.20.020(A).

In this instance, the ADB’s design directives after the December 19 hearing focused the design modification process and augmented the UDGs. This sort of constructive purpose underlies the City’s pre-application process articulated in Publication #B58 (Record 0483-84; 0502). Pre-application consultation is “highly encouraged” for major projects, the express goal being “to identify MAJOR issues and processing procedures applicable to the project which are helpful for an applicant to determine feasibility, design issues, timing, and various processes required for a project.” Id.

Applicant undertook pre-app review to ensure the proposal was on the right track, to flag and address any large issues with the design, to verify process and timing, and generally to head off potential problems. These efforts and hopes were not rewarded.

As stated above, the pre-app process was largely uneventful in regards to design. The only noted design issues were the two landscaping plan changes and the required assessment of colors and materials. The building itself and all design features was fully disclosed, and the size, shape, and skeleton of the structure remained essentially unchanged.

Staff also concluded in pre-app that no further SEPA or traffic analysis was required. Applicant went forward with the formal application in reliance on the pre-app findings.

Unfortunately for everyone, the City’s subsequent process was erratic, with inconsistent and shifting interpretations and application of City Code and policy, fluid requirements, and simple mistakes, all of which added to Applicant’s burden and eroded confidence.

The City is obligated to provide clarity, certainty, consistency, and predictability in its permitting and administrative processes. Applicant did its part, providing ample early information about the proposed design, and seeking direction and input through the pre-application process. From mid-September 2012 forward, the application has been beset by various issues that could and should have been identified by staff and resolved efficiently in the early stages. Record 0242, 0483-84; Transcript at 9-12.

A. ADB Hearings

Standards of review for open record design review hearings are set forth in ECDC Chs. 20.11 and 20.06. The first hearing last December was first continued to allow for design revision at the Board's direction, then cancelled when Applicant had to withdraw its first application and start the process over.

The second hearing on May 15 proceeded more conventionally, at least initially. ECDC 20.06.008. Applicant had the burden to show that the proposal is conforms with the applicable elements of the City's development regulations and Comprehensive Plan, including the contract rezone of the overall site and the Point Edwards Master Plan. ECDC 20.06.006.A, 20.11.020.

As allowed under ECDC 20.06.007(F), the Board deliberated publically after all testimony had been received. Record 0236-37; Transcript at 26-29. It in this context that the Board issued its re-design directives in December. In deliberations at the May 2013 hearing, the Board addressed certain issues and concerns and elaborated on some aspects of the proposal before voting to conditionally approve the proposal.

B. Closed Record Review.

Closed record review under ECDC Ch. 20.07 is on the record, giving deference to both staff and the Board in their respective areas of authority and expertise.

No new testimony or evidence may be accepted or considered by the Council. ECDC 20.07.005 (A), (B). The ADB's decision is entitled to deference and is presumed valid (ECDC 20.07.005.C). The burden of proof shifts to the appellant, to show from the record evidence and governing law that the ADB's decision was "clearly erroneous." Id. This is an affirmative demonstration. A clear and definitive showing must be made that the Board's decision is not supported by record evidence. Appellant has not made any such showing, and, we submit, no such showing can be made since the Record in detail and in the whole supports the Board's decision as confirmed in the FC.

This burden is a higher evidentiary standard than a preponderance of the evidence ("more likely than not"). It requires far more than some evidence and more than a majority of the evidence.

The appeal must rest on the record and the Council's scope of review is limited to that evidence. It is a proof and review standard that affords appropriate weight to the decision maker below, in this case the ADB, which is charged with responsibility for considering and weighing the evidence presented in light of its expertise, exercising reasonable discretion, and rendering a decision.

There are two tiers of discretion in decision making in a design review case under ECDC Ch. 20.11. ECDC 20.11.030(B) requires that staff determinations of compliance with the bulk and use standards under the Zoning Code "shall be given substantial deference and may be overcome only by clear and convincing evidence". And, again, such evidence must come from the record on review. Such matters are the primary responsibility of City staff. In its design review, the ADB is required to give the required deference to staff's conclusions in these areas.

Here, staff repeatedly has confirmed that the proposal meets all bulk (height, mass, lot coverage, setback, etc.) and use standards under City Code, including parking requirements. Record 0007-09, 17. The FC confirm and accept these determinations, which are supported by the Record. FC at 4-5, 23-24.

The Board received, considered, and accepted staff's bulk and use determinations in these areas, and also made its own independent review of the proposal and all evidence presented before concluding the revised design as conditioned in the approval met applicable design criteria and standards. These actions are reflected in the FC.

By contrast with bulk and use determinations, design determinations are the duty and prerogative of the Board, subject to controlling standards and the evidence presented. ECDC 20.11.020(A). Its decisions in such matters are presumed valid unless proven to be clearly erroneous on the record. ECDC 20.07.005. Under ECDC Ch. 20.11, the Board has authority and responsibility to render determinations on design matters.

Staff has an advisory and support role in regards to design issues, not the primary role that it serves in confirming conformance with development standards. Substantive decision making responsibility for design is vested in the Board, and it is the Board's view and decision to which the reviewer defers, not views expressed by staff. Staff's

design commentary assists and informs the Board, but is not controlling. In fact, were the ADB simply to follow staff's urgings in design matters, deferring there as it does in matters of zoning compliance, the result would be a derogation of responsibility and reversible error. That the ADB differed from staff on certain aspects of this design review is clear from the record, and equally clear is that the Board exercised its independent judgment in deciding based on the evidence presented.

The Board's decision and the FC encompass both its determinations in regard to bulk and use standards in deference to staff findings and decisions, and in regard to the architectural, aesthetic, style and other design aspects of the proposal considered by the Board in light of the record, with non-binding input from staff.

Giving the requisite and proper deference to staff and the ADB together in zoning matters and to the ADB alone in design aspects, the Council must sustain the decision unless Appellant presents compelling evidence from the Record showing that the Board's conditional approval was clearly wrong.

There has been no such showing, nor, Applicant submits, can there be. The Record supports the staff's determinations of conformance with all zoning bulk and use standards, and the Board's affirmation of those findings and its approval of the design elements of the proposal. The ADB's decision as issued should be upheld by the Council on review.

IV. REPLY TO APPELLANT'S ARGUMENT

Appellant's Appeal follows very closely the Woodway Appeal and alleges error by the ADB in regard to the same nine UDGs identified by Woodway. There is no citation to the Record in support of these contentions. Reference is made to Applicant's reply to the Woodway Appeal and supplementary argument thereto made this date, and the points and arguments made in reply to the Woodway Appeal are re-stated in this reply.

In addition, the Supporting References to the Record attached as Schedule 1 to the Waggener Appeal are incorporated herein by this reference as part of this reply.

Appellant's contentions are expressions of opinion, valid as such, but not factual, and are outside the Record. Accordingly, they are not evidentiary and are beyond the

scope of the Council's review authority. Even accepted as presented, however, Appellant's statements would be insufficient to overcome the Record evidence and the Board's consistent decision.

Applicant appreciates that Appellant disapproves of the proposal, but it is allowed under the governing Code and Comprehensive Plan provisions and design guidelines, it is within the approved density for the project, and it has been designed in accordance with these standards and the City's requirements and direction.

Building 10 on this site has been contemplated since Point Edwards was introduced, vetted, and approved over a decade ago. It has been the subject of specific design review twice, first in 2006, when a larger, taller, more massive level-roofed building, hinged in the center with east (five visible stories facing north) and west (four visible stories facing northwest) wings, and a mixture of surface and below-ground parking, was approved by the ADB and permitted by the City (in 2008) but never built.

This second proposal is quite similar to the 2006 version, though less massive, and different in certain design respects. Instead of 69 residential units, it would contain 85, four fewer than allowed, in a building with a smaller footprint.

Applicant does not contend that this proposal should be approved because a very similar building was approved in 2006. This proposal must stand on its own merit and meet the City's zoning and design standards, which Applicant submits it does, in every respect. The point is that the current proposal is not unprecedented, nor is it out of line with the Point Edwards project, its Master Plan, or earlier design concepts considered and approved by the City.

V. CONCLUSION AND REQUESTED RELIEF

Appellant's concerns and arguments lack evidentiary support in the Record, and fail to meet the substantial burden of proof needed to overturn the ADB's decision.

Based on the foregoing, the Appeal has no effect. The Applicant respectfully requests that the Council dismiss the Appeal and sustain the determinations and

decision of the ADB reflected in its May 16, 2013 written decision as supported by the consistent FC.

Very truly yours,

Richard E. Gifford
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